Supreme Court, U.S.
FILED
02-47 JUL - 3 2002
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

THE MAYOR & CITY COUNCIL OF BALTIMORE,
a Municipal Corporation,

Petitioner,

v.

STATE OF WEST VIRGINIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

STANLEY J. LEVY
LEVY PHILLIPS & KONIGSBERG, LLP
520 Madison Avenue
4th Floor
New York, New York 10022
212-605-6200

CARL E. TUERK, JR.
Counsel of Record
COOPER & TUERK, LLP
201 North Charles Street
Suite 2300
Baltimore, Maryland 21201
410-539-0300

Attorney for Petitioner, the Mayor & City Council of Baltimore

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

74 pg.

QUESTIONS PRESENTED

I. Did the Sixth Circuit Depart from Accepted Practice by Refusing to Apply the Mandatory "Excusable Neglect" Standard of Bankruptcy Rule 9006(b)(1) to Respondents' Request to Extend a Court-Ordered Deadline?

II. Did the Sixth Circuit Depart from Accepted Practice by Affirming the Bankruptcy Court's Ruling Which Granted the Respondents' Relief They Had Not Specifically Sought, In Violation of Bankruptcy Rule 9013 and Federal Rule of Civil Procedure 7(b)(1)?

III. Did the Sixth Circuit Violate Petitioner's Equal Protection Rights, and Depart from Acceptable Practice by Affirming the Bankruptcy Court's Discriminatory Misapplication of the "Substantial Compliance" Standard, Even Assuming Arguendo That This Standard Applies in This Case?

LIST OF PARTIES

State of West Virginia
Edward J. Cottingham, Esquire
Ness, Motley, Loadholt, Richardson & Poole
28 Bridgeside Boulevard
P.O. Box 1792
Mt. Pleasant, South Carolina 29465
843-216-9000

Michigan School Class Action
Philip Goodman, Esq.
Philip J. Goodman, P.C.
280 North Old Woodward Avenue, Suite 407
Birmingham, Michigan 48009
843-216-9148

County of Wayne, Michigan
Philip Goodman, Esq.
Philip J. Goodman, P.C.
280 North Old Woodward Avenue, Suite 407
Birmingham, Michigan 48009
843-216-9148

B.C. Hydro & Electric
J. J. Camp
4th Floor, Randall Building
555 West Georgia Street
Vancouver, BC
V6B 123, Canada

U.S. Trustee
Neal J. Weill, Esquire
The Office of the United States Trustee
36 East Seventh Street, Suite 2030
Cincinnati, Ohio 45202
513-684-6988

LIST OF PARTIES – Continued

Mayor & City Council of Baltimore
Carl E. Tuerk, Jr.
Cooper & Tuerk, LLP
201 North Charles Street, Suite 2300
Baltimore, Maryland 21201
410-539-0300

Mayor & City Council of Baltimore
Stanley J. Levy
Alani Golanski
Levy Phillips & Konigsberg, LLP
520 Madison Avenue, 4th Floor
New York, New York 10022
212-605-6200

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
A. Preliminary Statement of Issues	3
B. Statement of Facts	3
C. The Bankruptcy Court's Decision and Order	8
D. The Court of Appeals' Opinion and Judgment	10
Reasons For Granting the Writ	11
I. The Sixth Circuit Departed from Accepted Practice by Refusing to Apply the Mandatory "Excusable Neglect" Standard of Bankruptcy Rule 9006(b)(1) to Respondents' Request to Extend a Court-Ordered Deadline	11
II. The Sixth Circuit Departed from Accepted Practice by Affirming the Bankruptcy Court's Ruling Which Granted the Respondents' Relief They Had Not Specifically Sought, In Violation of Bankruptcy Rule 9013 and Federal Rule of Civil Procedure 7(b)(1)	14

TABLE OF CONTENTS – Continued

Page

III. The Sixth Circuit Violated Petitioner's Equal Protection Rights, and Departed from Acceptable Practice by Affirming the Bankruptcy Court's Discriminatory Misapplication of the "Substantial Compliance" Standard, Even Assuming Arguendo That This Standard Applies in This Case 19

Conclusion 24

Appendix

Opinion of the United States Court of Appeals for the Sixth Circuit
Decided and Filed: April 4, 2002 ..... App. 1

Judgment of the United States Court of Appeals for the Sixth Circuit
Filed: April 4, 2002 ..... App. 17

Judgment in the United States District Court for the Southern District of Ohio, Western Division
Filed: October 26, 2000 ..... App. 19

Order in the United States District Court for the Southern District of Ohio, Western Division
Filed: October 26, 2000 ..... App. 20

Decision and Order of the United States Bankruptcy Court Southern District of Ohio, Western Division
Filed: January 5, 2000 ..... App. 32

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995) 21

A.J. McNulty & Co. v. Sec'y of Labor, 283 F.3d 328 (D.C. Cir. 2002) 15

Bancker Constr. Corp. v. Reich, 31 F.3d 32 (2d Cir. 1994) 15

Bell v. Bruen, 1 How. 169, 42 U.S. 169 (1843) 20

Brunswick Assoc. Ltd. P'ship v. Pioneer Inv. Serv. Co., 643 F.2d 673 (6th Cir. 1991) 13

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976) 21

Builders Steel Co. v. Heidenreich (In re Heidenreich), 216 B.R. 61 (N.D. Ok.1998) 17

Conway v. Icahn & Co., 16 F.3d 504 (2d Cir. 1994) 22

Delo v. Stokes, 495 U.S. 320, 110 S. Ct. 1880 (1990) 20

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302 (1988) 16

First Tenn. Bank Nat'l Ass'n v. Barreto, 268 F.3d 319 (6th Cir. 2001) 15

Franklin v. District of Columbia, 163 F.3d 625 (D.C. Cir. 1998) 18

Fraternal Order of Police v. United States, 152 F.3d 998 (D.C. Cir. 1998) 21

Gay v. Waiters' & Dairy Lunchmen's Union, 489 F. Supp. 282 (N.D. Cal. 1980) 23

Humetrix, Inc. v. Gemplus, S.C.A., No. 97-55080, 1997 U.S. App. LEXIS 30062, at *4-5 (9th Cir. Oct. 23, 1997) 22

TABLE OF AUTHORITIES – Continued

Page

In re Bistrian, 184 B.R. 678 (E.D. Pa. 1995) 17

In re Coastal Alaska Airlines, Inc., 920 F.2d 1428 (9th Cir. 1990) 11

In re Dix, 95 B.R. 134 (Bankr. 9th Cir. 1988) 12

In re Lewis, 93 B.R. 462 (Bankr. S.D. Miss. 1987) 12

In re S. A. Morris Paving Co., 92 B.R. 1961 (Bankr.W.D.Va. 1988) 11

In re Vertientes, Ltd., 845 F.2d 57 (3d Cir. 1988) 11, 13

Kropelnicki v. Siegel, Docket Nos. 01-7025, 01-7233, 2002 U.S. App. LEXIS 9513 (2d Cir. May 8, 2002) 15

Lahaina-Maui Corp. v. Tau Tet Hew, 362 F.2d 419 (9th Cir. 1966) 23

Mayor & City Council of Baltimore v. State of West Virginia, et al., 285 F.3d 522 (6th Cir. 2002) 1

McClure v. Johns-Manville, No. CA 85-1302-X-C, 1987 U.S. Dist. LEXIS 13460 (S.D. Ala. Jan. 20, 1987) 12

Oliver Resources PLC v. International Fin. Corp., 62 F.3d 128 (5th Cir. 1995) 23

Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 113 S. Ct. 1489 (1993) 11, 12, 13

Radisson Hotel Corp. v. Pontchartrain Hotel Group, L.L.C, 983 F. Supp. 692 (E.D. Mich. 1997) 23

Rodriguez-Silva v. INS, 242 F.3d 243 (5th Cir. 2001) 21

Schlesinger v. Ballard, 419 U.S. 498, 95 S. Ct. 572 (1975) 21

TABLE OF AUTHORITIES – Continued

Page

Snellman v. Ricoh Co., 836 F.2d 528 (Fed. Cir. 1987) 18

Songer v. St. Helena Unified Sch. Dist., Nos. 98-15798, 98-16559, 2000 U.S. App. LEXIS 18143 (9th Cir. July 25, 2000) (reported in Table Case Format at: 2000 U.S. App. LEXIS 32620) 18

Talano v. Northwestern Med. Faculty Found., Inc., 273 F.3d 757 (7th Cir. 2001) 16

United States v. 0.23 of an acre, 532 F.2d 753 (4th Cir. 1976) 20

United States v. Berrey, 28 M.J. 714 (U.S. 1989) 20

United States v. Maldonado-Acosta, 210 F.3d 1182 (10th Cir. 2000) 15

United States v. Vargas, 925 F.2d 1260 (10th Cir. 1991) 15

Williams v. Armontrout, 891 F.2d 656 (8th Cir. 1989) 21

William Penn S&L Assn. v. Chipin Cliveden Assocs., 760 F.2d 263 (3d Cir. 1985) 22

Zim v. Western Pub. Co., 573 F.2d 1318 (5th Cir. 1978) 20

STATUTES

U.S. CONST. amend. V 3, 19, 21

U.S. CONST. amend. XIV 21

28 U.S.C. § 158(a) 1

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 1

TABLE OF AUTHORITIES – Continued

Page

Bankruptcy Rule 9006 ..... 12, 13

Bankruptcy Rule 9006(b) ..... *passim*

Bankruptcy Rule 9006(b)(1) ..... *passim*

Bankruptcy Rule 9013 ..... *passim*

Rule 7(b)(1) Federal Rules of Civil Procedure ..... *passim*

OTHER MATERIALS

5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1191, 1192 (2d ed. 1990) 17

9 COLLIER ON BANKRUPTCY ch. 9013, ¶ 9013.02[1] (Lawrence P. King ed., 15th ed. 1994) 17

4 WILLISTON ON CONTRACTS §§ 620, at 751 (3d ed. 1961) 20

2001 Year End Report on the Federal Judiciary, January 1, 2002, http://www.supremecourts.gov at 8 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Mayor and City Council of Baltimore, Maryland, a Maryland Municipal Corporation, [hereinafter "Petitioner" or "Baltimore"] respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 285 F.3d 522. [Appendix to Petition for Certiorari ["App."] App.1] The Decision and Order of the Bankruptcy Court for the Southern District of Ohio, Western Division [App.32] and the Opinion and Order of the United States District Court for the Southern District of Ohio [App.19] are unreported.

JURISDICTION

The Bankruptcy Court issued its Decision and Order on January 7, 2000. Baltimore herein filed a timely appeal to the District Court, which affirmed the Bankruptcy Court by an Opinion and Order dated October 26, 2000. Upon Baltimore's timely appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the Bankruptcy Court by Decision and Opinion entered April 4, 2002. The Sixth Circuit's Judgment was entered April 4, 2002. [App.17] The jurisdiction of the Bankruptcy Court was invoked under 28 U.S.C. § 158(a); the jurisdiction of the Court of Appeals was invoked under 28 U.S.C.

§ 1291; the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bankruptcy Rule 9006(b)(1) provides in pertinent part:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Bankruptcy Rule 9006(b).

Bankruptcy Rule 9013 provides in pertinent part:

> A request for an order . . . shall state with particularity the grounds therefore, and shall set forth the relief or order sought.

Rule 7(b)(1) of the Federal Rules of Civil Procedure prescribes in pertinent part:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought.

Fed.R.Civ.P. 7(b)(1).

The Equal Protection component of the Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Preliminary Statement of Issues

The issues presented by this Petition are whether the Sixth Circuit erred in affirming the Bankruptcy Court's ruling, which (1) improperly disregarded the "excusable neglect" requirement of Bankruptcy Rule 9006(b) and granted Respondents' motion to extend a deadline on "substantial compliance" grounds not authorized by the Rule, (2) improperly afforded the Respondents' relief that they did not seek, in violation of Bankruptcy Rule 9013 and Rule 7(b)(1) of the Federal Rules of Civil Procedure, and (3) unfairly misapplied the "substantial compliance" standard –even assuming *arguendo* that it was applicable here–in violation of Petitioner's equal protection rights.

B. Statement of Facts

Eagle-Picher Industries, Inc., is a former manufacturer of asbestos-containing building products responsible for substantial damage to Petitioner Baltimore's public buildings. Eagle-Picher filed for Chapter 11 bankruptcy protection in 1991. A plan of reorganization was confirmed by the Bankruptcy Court and the District Court on November 18, 1996. The plan of reorganization provided for the creation of the "Eagle-Picher Industries, Inc. Asbestos Property Damage Settlement Trust." This Trust was to be

funded by a payment from Eagle-Picher in the amount of $3 million, out of which all of the claims for damages against it resulting from the installation of its asbestos products into public and private buildings were to be satisfied.

After the plan confirmation, several disputes arose regarding the distribution of the $3 million. Pursuant to the Property Damage Settlement Trust Agreement, the competing claimants, including all parties to this dispute, negotiated and eventually agreed upon a two-tiered scheme, and upon a strict, mandatory and tightly defined mechanism by which claimants would be assigned one of the tiers. The agreement was memorialized as a "Stipulation for Treatment of Property Damage Claims," signed by all property damage claimants, including the Respondents' below. [App.3]

The claimants' Stipulation provided that, after the allowance and payment of certain expenses and fees, the balance of the Settlement Trust would be divided into two separate funds, a "Tier I Product ID Claimants' Fund" and a "Tier II Non-Product ID Claimants' Fund." The Tier I fund was to receive two-thirds of the available funds for distribution (approximately $2 million), and the Tier II fund was to receive the remaining one-third (approximately $1 million).

The Stipulation was adopted and court-approved for the benefit of the signatory claimants, and contemplated a strict mechanism to be mechanically applied by which all further disputes would be automatically avoided. Any claimant seeking Tier I status was required to comply with a few express provisions, and all claimants explicitly agreed to do so.

First, by paragraph 5 of the Stipulation, access to the Tier I procedures was limited to:

> Only those Claimants whose claim against the Debtor is based upon proof that its damages result from an asbestos-containing building material manufactured, sold or distributed by the Debtor and installed and/or present in a building owned, operated or leased by a Claimant for which a timely Proof of Claim was filed in Case No. 1-91-00100. [Exhibit B, Joint Motion for Approval of Stipulation of Treatment of Property Damage Claims and Annexed Eagle-Picher Property Damage Claims Resolutions Procedures and for the Approval of the Appointment of W. D. Hilton, Jr. as the Asbestos Property Damage Claims Administrator]

Paragraph 7 of the Stipulation contained further express provisions establishing mandatory conditions that were requisite to any Tier I treatment. Paragraph 7 provided:

> Any holder of a timely filed Asbestos Property Damage Claim against the Debtor which had not been disallowed or dismissed prior October 31, 1996, shall have the right to elect to attempt to seek payment under the Tier I procedures. To do so, the Claimant *must* serve written notice of its intention to have its claim treated as a Tier I – Product ID Claim hereunder on the Committee [of Property Damage Claimants], NAAG [National Association of Attorneys General], and the Property Damage Claims Administrator (the "PDCA" . . .) so that it is actually received by no later than one month after the date of the Court's approval of this Stipulation. *Any Claimant not giving such written notice*

> *shall automatically, and without further action by the claimant, have their claim treated as a Tier II Non-Product ID claim hereunder.* [App.4] (Emphasis added)

Paragraph 7 thus imposed a mandatory requirement that, within thirty (30) days of Court approval of the Stipulation, any claimant electing Tier I status serve a written election of its intention to have its claim treated as a Tier I Product ID claim on three precisely named entities, the Unofficial Committee, the NAAG, and the PDCA. The penalty for failing to comply was specific and automatic: any claimant failing to comply with the written election procedures was "automatically and without further notice" to have their claim treated as a Tier II Non-Product ID claim. This stipulated assignment of Tier II status was not a severe penalty, because those claimants that failed to comply with Paragraph 7 would still be entitled to funds, albeit from a lesser pool. Moreover, it was implicitly left to each claimant to weigh the burdens of strict compliance with the benefits, and to proceed accordingly.

On May 4, 1999, a "Joint Motion for Approval of Stipulation of Treatment of Property Damage Claims and Annexed Eagle-Picher Property Damage Claims Resolutions Procedures and for the Approval of the Appointment of W. D. Hilton, Jr. as the Asbestos Property Damage Claims Administrator" was filed with the Bankruptcy Court. The Joint Motion was filed on behalf of all of the holders of asbestos property damage claims against Eagle-Picher and the reorganized Debtor. Respondents were parties to the Joint Motion.

On May 7, 1999, the Bankruptcy Court entered an Order granting the Joint Motion. This Order found, *inter*

alia, that the Eagle-Picher Property Damage Claims Resolution Procedures were "reasonable" and were "designed to insure an efficient, equitable and fair distribution of the funds available to Asbestos Property Damage Claimants."

On May 17, 1999, ten (10) days after the approval of the Order approving the Stipulation, and twenty-one (21) days prior to the June 7, 1999 deadline, the NAAG, as a member of the unofficial committee of property damage claimants, sent a letter to counsel for all property damage claimants, including all movants below, reminding them of the claim procedures contained in the Court approved Stipulation, and in particular the upcoming mandatory deadlines. The letter stressed the need for the parties to comply strictly and in a timely manner in order to facilitate prompt payment. In other words, it was clear to all that any claimant's failure to adhere to the deadlines would prejudice *the other claimants* by causing potential delay in the receipt of funds.

As the Respondents have conceded throughout, they did not thereafter file their election to be treated as a Tier I claimant in the manner required, or within the mandatory time limit imposed by the court-approved Stipulation. Only two claimants, the Petitioner herein and the Cincinnati School District, correctly and timely complied with Paragraph 7 of the Stipulation.

On August 10, 1999, the PDCA sent notice to counsel for the Respondents below that he had not received from them the required election of intent by the "required deadline." Apparently in response to that letter, the Respondents, on or about August 23, 1999, filed with the Bankruptcy Court a "Motion for Waiver or Modification of

Deadline to File Statement of Intent with Property Damage Claims Administrator." The Respondents admitted that they had failed to comply with the Stipulation and Order in a timely fashion, but claimed that this failure was due to "inadvertence." The relief the Respondents sought was for an order decreeing that the "*deadline* for filing a copy of the statement of intent with the PDCA be waived or modified *to allow for an additional ten days to file such notice.*"[1] [App.5] (Emphasis added)

The Petitioner herein timely opposed the motion and argued, *inter alia*, that the Respondents had failed to establish any "excusable neglect" as required by the provisions of Bankruptcy Rule 9006(b)(1), which governs any application seeking an extension of the time within which an act must be done pursuant to a rule, order, or court-approved stipulation.

C. The Bankruptcy Court's Decision and Order

By Decision and Order entered January 7, 2000, the Bankruptcy Court granted the Respondents' motion without a hearing. The Court improperly discounted both the applicability of Bankruptcy Rule 9006(b)(1) and the deadline extension which the Respondents sought, and instead took the position that the Respondents' claim that they had "substantially complied" with the Stipulation at

---

[1] Respondents' motion did not state that it was filed pursuant to any particular Bankruptcy Rule and only raised as grounds for the requested relief that movants had "substantially complied" with the Court's May 6, 1999 Order.

issue controlled the disposition of their motion.[2] In this way, the Court disregarded the "excusable neglect" requirement of Bankruptcy Rule 9006(b) and granted Respondents' motion to extend a deadline on "substantial compliance" grounds not authorized by the Rule. [App.37]

In its Decision and Order the Court further incorrectly concluded that, "[a]s the need for notice was not intended to benefit other Tier I Pool claimants, *they are not prejudiced* by a finding that the notice provisions were substantially complied with by the movants." [App.35] (Emphasis added)[3] On the other hand, and paradoxically, the Court next concluded, "that movants would suffer *severe prejudice* if the present motion is denied. *Although the movants could participate as Tier II Pool claimants*, the amount of money available for recovery is extremely limited." [App.36] (Emphasis added)

---

[2] The Bankruptcy Court stated that, "Movants have not sought relief from this Court under an excusable neglect standard as has been suggested by the Opposition. Instead, they have presented arguments under substantial compliance theory, and it is on that basis that this Court has considered the matter." [App.33-34]

[3] It is undisputed that as the result of the opinions below Baltimore's recovery is reduced by approximately $1.2 million. The Bankruptcy Court also reasoned that, "[s]ince the only entity who was not noticed has disclaimed any prejudice, no real prejudice exists." [App.36] However, the Petitioner *did* sustain "real prejudice." Moreover, the PDCA would not, in any event, have been prejudiced because he was to be paid additional sums for each claim reviewed. Thus, the inclusion of additional claimants, whether late filed or not and whether compliant or not, could only serve to benefit the PDCA. Indeed, it was precisely those claimants, such as Baltimore, who timely and properly filed claims seeking Tier I status under the Stipulation who were prejudiced by the inclusion of those not complying, and it was precisely diligent claimants such as Baltimore that the Stipulation was intended on its face to benefit.

D. The Court of Appeals' Opinion and Judgment

By its Opinion and Judgment filed April 4, 2002, the Sixth Circuit affirmed the ruling of the Bankruptcy Court. The Court held that "substantial compliance can operate to obviate the need for a deadline extension." [App.3] The Court acknowledged, however, that the Respondents below had sought relief that was fully bound up with the deadline imposed upon them by the Stipulation into which they and the Petitioner herein had entered. Thus, the Sixth Circuit recited that the Respondents had, "requested that the deadline be waived or modified to allow for an additional ten days to file such notice." [App.5]

The Sixth Circuit further acknowledged that it was, "unaware of any previous case applying the substantial compliance doctrine to avoid deadline extension issues." [App.10-11] Nevertheless, the Court erroneously held that, "substantial compliance can be properly applied to find deadline compliance in situations where a deadline extension would be permissible only by the 'excusable neglect' standard of Bankruptcy Rule 9006(b)." [App.13]

Next the Sixth Circuit concluded that the Bankruptcy Court had not abused its discretion in applying the substantial compliance doctrine in the present case. Importantly, the Court accepted the Bankruptcy Court's determination that Baltimore had suffered "no prejudice" because its ability, "to assert a claim and seek recovery had not been harmed." [App.15] Nevertheless, the Court also accepted the Bankruptcy Court's conclusion that the Respondents below "would suffer severe prejudice from denial of their motion." [App.15]

The Sixth Circuit thus reenacted the legally unacceptable paradox by its holding both that Baltimore would

suffer *no prejudice* as a result of its reduced recovery were the motion granted, but that the Respondents would suffer *severe prejudice* as a result of their reduced recovery were the motion denied. However, it was no less true of the Respondents than it was of Baltimore that, by an adverse ruling, they would still have the ability, "to assert a claim and seek recovery."

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Departed from Accepted Practice by Refusing to Apply the Mandatory "Excusable Neglect" Standard of Bankruptcy Rule 9006(b)(1) to Respondents' Request to Extend a Court-Ordered Deadline.

Because the Respondents sought relief which was only available to them pursuant to Bankruptcy Rule 9006(b)(1), the Bankruptcy Court, as well as the Sixth Circuit, was required to apply the "excusable neglect" standard prescribed by that Rule. The clear language of that Rule indicates that it specifically applies to any failure to comply with a court-ordered deadline as well as a deadline established by any other Bankruptcy Rule.[4]

[4] While it is true that, as a factual matter, most of the cases applying Rule 9006(b)(1) have typically involved situations in which the failure to timely comply arose under another of the Bankruptcy Rules or a court notice given pursuant to the Rules; *see Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993); *In re Coastal Alaska Airlines, Inc.*, 920 F.2d 1428 (9th Cir. 1990); *In re Vertientes, Ltd.*, 845 F.2d 57 (3d Cir. 1988); *In re S. A. Morris Paving Co.*, 92 B.R. 1961 (Bankr. W.D. Va. 1988); it is clear that the phrase "or

(Continued on following page)

Thus, in *Pioneer Investment* this Court stressed that, "[t]he time-computation and time-extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 389 n.4, 113 S. Ct. 1489 (1993).

This Court continued in *Pioneer Investment* that Rule 9006(b)(1)'s excusable neglect standard, "was patterned after Rule 6(b)" of the Federal Rules of Civil Procedure, pursuant to which a district court may enlarge the period and permit the tardy act only, "where the omission is the 'result of excusable neglect.'" *Pioneer Inv.*, 507 U.S. at 391, 113 S. Ct. 1489; *see, e.g., McClure v. Johns-Manville*, No. CA 85-1302-X-C, 1987 U.S. Dist. LEXIS 13460, at *2-3 (S.D. Ala. Jan. 20, 1987) (ruling that, under Federal Rule 6(b), "[a] demonstration of excusable neglect is mandatory," and that, because the motion at issue contained, "only the bare allegation that failure to timely substitute was due to excusable neglect," it did, "not come close to the required showing necessary to grant such relief"); *In re Dix*, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988) (ruling that, in the analogous context of a bar date order, "an extension requested after the bar date may only be granted upon a showing of excusable neglect"); *In re Lewis*, 93 B.R. 462, 469 (Bankr. S.D. Miss. 1987) (where "failure of the creditor to timely file its objection to the plan was caused by the failure of its attorney to properly and correctly read the

---

by order of court" has equivalent meaning in the interpretation of Rule 9006(b)(1).

order of this Court, . . . no 'excusable neglect' was established"); *In re Vertientes, Ltd.*, 845 F.2d 57, 60 (3rd Cir. 1988) ("The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.")[5]

The Sixth Circuit's decision in the present case conflicts with the letter and spirit of this Court's decision in *Pioneer Investment*, and with the many Federal decisions that have applied the "excusable neglect" standard under analogous circumstances. This conflict is underscored by the fact that the Sixth Circuit's opinion made no mention of this Court's opinion in *Pioneer Investment*.

Moreover, there are significant policy reasons why the Sixth Circuit's opinion must be reversed. In fiscal year 2001, 1,437,354 bankruptcies were filed.[6] As the drafters of Rule 9006 undoubtedly concluded, the nature of the work of the bankruptcy courts and the size of their caseload requires the elimination, to the extent possible, of unnecessary procedural delays. This Court's opinion in *Pioneer Investment* reinforces the advisability of uniform guidelines to permit courts to determine conduct which is excusably late from that which is not. By ignoring the mandatory requirements of Rule 9006(b) as elucidated in *Pioneer Investment*, the Sixth Circuit's opinion, which permitted Respondents' late filings without the required

---

[5] In *Brunswick Assoc. Ltd. P'ship v. Pioneer Inv. Serv. Co.*, 643 F.2d 673 (6th Cir. 1991) the Sixth Circuit adopted *In re Vertientes Ltd.* Were it not for this fact Baltimore would be seeking review under the "conflicting decision" provision of Rule 10.

[6] 2001 Year End Report on the Federal Judiciary, January 1, 2002, http://www.supremecourts.gov at 8.

finding of "excusable neglect," reintroduces confusion and inconsistency in an area in which Congress and this Court have already moved to provide clarity and uniformity. The potential effect of the Sixth Circuit's opinion on the operation of the already over-burdened bankruptcy courts is clearly adverse. Given this potential adverse effect, the Sixth Circuit's opinion raises an important issue affecting the administration of one of this country's busiest courts. Further, the opinion's failure to apply the requirements of Rule 9006(b) so far departs from accepted and usual course of bankruptcy proceedings that this Court ought to exercise its supervisory powers to review the matter.

II. The Sixth Circuit Departed from Accepted Practice by Affirming the Bankruptcy Court's Ruling which Granted the Respondents' Relief They Had Not Specifically Sought, in Violation of Bankruptcy Rule 9013 and Federal Rule of Civil Procedure 7(b)(1).

The Respondents, signatories to the Court-ordered Stipulation that prescribed a mandatory thirty-day (30) period within which claimants must notify three expressly enumerated entities of their election to participate in the Tier I funds, requested that the deadline be waived or modified to allow them an additional ten (10) days to file such notice. [App.5] By affirming the ruling which permitted the Respondents to benefit from the Tier I pool absent any showing of excusable neglect, the Sixth Circuit so far departed from the accepted judicial interpretation of Bankruptcy Rule 9006(b)(1) as to warrant this Court's review.

The Respondents had the option of moving for Tier I status notwithstanding their failure to comply with the

procedures requisite to such status. The notice requirements of the May 7, 1999, Bankruptcy Order approving the parties' Stipulation were conditions precedent to any such participation at the Tier I level. Because the requirements were conditions precedent, the Court could not afford any relief from those conditions *sua sponte*. *See United States v. Maldonado-Acosta*, 210 F.3d 1182, 1183 (10th Cir. 2000) (holding that when a "condition precedent" is at issue, "the court may not act *sua sponte* in such matters"); *accord United States v. Vargas*, 925 F.2d 1260, 1267 (10th Cir. 1991).

The court's lack of authority to grant relief *sua sponte* with regard to a condition precedent parallels and derives from its similar lack of authority when it comes to affirmative defenses. *See, e.g., First Tenn. Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 331 n.9 (6th Cir. 2001) ("the non-occurrence of a condition precedent *is* an affirmative defense"); *cf. Kropelnicki v. Siegel*, Docket Nos. 01-7025, 01-7233, 2002 U.S. App. LEXIS 9513, at *26 n.7 (2d Cir. May 8, 2002) (holding that, because the statute of limitations is an affirmative defense, a district court can not raise such a defense *sua sponte*); *see generally A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 334 (D.C. Cir. 2002) ("'it is an affirmative defense . . . that compliance was impossible or infeasible'"); *Bancker Constr. Corp. v. Reich*, 31 F.3d 32, 34 (2d Cir. 1994) (same).

In the present case, the Respondents compliance or non-compliance with the notice requirements of the Stipulation was in the nature of an affirmative allegation regarding condition precedents imposed by that Stipulation, and thus could not be decreed *sua sponte*. In the proceedings below, while the Respondents did allege substantial compliance, the relief that they sought –

namely, an extension of the deadline within which to comply – was not available to them on that ground. *Cf. Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 2310 (1988) ("the statute confers on governmental defendants an affirmative defense that obligates the plaintiff to demonstrate compliance with the notice requirement before he or she may recover at all").

The relief that the Respondents sought was available to them only under Bankruptcy Rule 9006(b)(1). Had the Respondents sought some other sort of relief – such as an Order decreeing their Tier I status even absent their compliance with the Stipulation – then the Petitioner would have approached the motion proceedings differently. For instance, the clear focus might have been: (1) the ramifications of alleged actual notice upon the facial requirement of strict compliance with the notice provisions; (2) the applicability of a "substantial compliance" standard to excuse notice requirements to which the defaulting parties had expressly agreed; (3) the elements of the substantial compliance doctrine, and possible conflicts in its enunciation; and (4) the satisfaction of any such substantial compliance standard.

Bankruptcy Rule 9013 prescribes that, "A request for an order . . . shall state with particularity the grounds therefore, and *shall set forth the relief or order sought.*" (Emphasis added) Rule 7(b)(1) of the Rules of Civil Procedure similarly prescribes that, "an application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefore, and *shall set forth the relief or order sought.*" Fed. R. Civ. P. 7(b)(1) (Emphasis added); *Talano v. Northwestern Med. Faculty Found., Inc.*, 273 F.3d 757, 760 (7th Cir. 2001).

As stated in *In re Bistrian*, 184 B.R. 678 (E.D. Pa. 1995):

> Because of the paucity of case law analyzing Rule 9013, we look for guidance in Federal Rule of Civil Procedure 7(b)(1), which mirrors Rule 9013. . . . The Advisory Committee that wrote the Bankruptcy Rules modeled Rule 9013 after Rule 7(b)(1) of the Federal Rules of Civil Procedure. 9 COLLIER ON BANKRUPTCY ch. 9013, ¶ 9013.02[1] (Lawrence P. King ed., 15th ed. 1994). There can be no question that the rules are substantively identical. Rule 7(b)(1) gives adverse parties notice that a party has asked a court for a ruling. By channeling litigants into a written, rather than oral, discourse with each other and the court, Rule 7(b)(1) assures that parties will know of contentions and requests in a litigation and will have the opportunity to oppose – or at least address – such views and demands.

184 B.R. at 682 & n.8.

Other Federal courts have similarly emphasized that:

> Under the rules of pleading which govern this Court, a motion, whether filed as a contested matter or in an adversary proceeding, must, 'set forth the relief or order sought.' Bankruptcy Rule 9013; Bankruptcy Rule 7007; Federal Rule of Civil Procedure 7(b)(1). The purpose of such a requirement is to ensure that the party against whom relief is sought has notice of the same. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1191, 1192 (2d ed. 1990).

Builders Steel Co. v. Heidenreich (In re Heidenreich), 216 B.R. 61, 64 (N.D. Ok.1998).

The Bankruptcy Court did not have the discretion to afford the Respondents' relief that they did not request, and was therefore bound to determine the underlying motion based on the standard prescribed by Rule 9006(b)(1) governing the enlargement of the period within which an act must be done. *See Snellman v. Ricoh Co.*, 836 F.2d 528, 532 (Fed. Cir. 1987) ("[t]he district court properly interpreted Rule 7(b)(1) as requiring Ricoh to specifically set forth in its August 13, 1984 new trial motion that it sought the relief of a new trial on its counterclaim. Because Ricoh did not so specify, Ricoh did not move for a new trial"); *see also Songer v. St. Helena Unified Sch. Dist.*, Nos. 98-15798, 98-16559, 2000 U.S. App. LEXIS 18143, at *9 (9th Cir. July 25, 2000) (reported in Table Case Format at: 2000 U.S. App. LEXIS 32620) (reversing on ground that, because movants had not sought the relief provided, they, "were not entitled to judgment," citing Fed. R. Civ. P. 7(b)(1)); *Franklin v. District of Columbia*, 163 F.3d 625, 630 (D.C. Cir. 1998) ("[t]he District's July 22 motion properly sought relief from the July 8 injunctive order. Rule 7(b)(1) requires that motions state with particularity the grounds therefore and the relief sought").

Accordingly, the Sixth Circuit departed from the accepted and usual course of judicial proceedings conducted pursuant to Bankruptcy Rule 9013 and Federal Rule of Civil Procedure 7(b)(1) as to warrant this Court's review and exercise of supervisory power.

III. The Sixth Circuit Violated Petitioner's Equal Protection Rights, and Departed From Accepted Practice by Affirming the Bankruptcy Court's Discriminatory Misapplication of the "Substantial Compliance" Standard, Even Assuming Arguendo That This Standard Applies in This Case.

In addition to the erroneous disregard of Bankruptcy Rule 9006(b)(1)'s "excusable neglect" standard, and the prejudicial grant of relief not sought, which is proscribed by Bankruptcy Rule 9013 and Rule 7(b)(1) of the Federal Rules of Civil Procedure, the misapplication by the Bankruptcy Court and the Sixth Circuit of the "substantial compliance" standard further warrants this Court's review. In this respect, even assuming *arguendo* that the courts below were correct in applying the substantial compliance standard, their discriminatory application of this standard violated Petitioner's equal protection rights guaranteed to it by the Fifth Amendment.

The Sixth Circuit erroneously accepted the Bankruptcy Court's determination that, "[a]lthough the addition of movants to the Tier I Pool will very likely result in a smaller recovery for each claim holder, their ability to assert a claim and seek recovery is not harmed." [App.35-36] Nevertheless, the Sixth Circuit also accepted the Bankruptcy Court's contradictory conclusion that the movants below, "would suffer *severe* prejudice if the present motion is denied[, a]lthough the movants could participate as Tier II Pool claimants." [App.36] (Emphasis added)

The Sixth Circuit thus adopted the Bankruptcy Court's legally unacceptable paradox by its holding both that Baltimore would suffer *no prejudice* as a result of its

reduced recovery were the motion granted, but that the Respondents would suffer *severe prejudice* as a result of their reduced recovery were the motion denied. This is a discriminatory application of the "substantial compliance" doctrine, in violation of the Petitioner's equal protection rights. It could have been no less true of the movants than it was of Baltimore that, by an adverse ruling, they would still have the ability, "to assert a claim and seek recovery."

It has been a permanent and longstanding principle firmly embedded in this Court's jurisprudence that judicial standards, contract clauses, statutory provisions and the like must be construed to avoid absurdity or unfair advantage to one party over the other. *See generally Bell v. Bruen*, 1 How. 169, 42 U.S. 169, 187 (1843). Thus, the courts of appeals have stressed that any such constructions that, "'giv[e] one party unfair or unreasonable advantage over the other [are] to be avoided.'" *Zim v. Western Pub. Co.*, 573 F.2d 1318, 1324 (5th Cir. 1978); *cf. United States v. 0.23 of an acre,* 532 F.2d 753, 753 n.3 (4th Cir. 1976) ("[i]t is basic hornbook law that, '[the] words of a contract should be given a reasonable meaning rather than an unreasonable one and a court will endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other'") (quoting 4 WILLISTON ON CONTRACTS § 620, at 751 (3d ed. 1961)); *United States v. Berrey*, 28 M.J. 714, 727 (U.S. 1989) ("our purpose is to construe the rule as drafted, and to foster its workability and fairness to both sides").

It is further well established that a court's selective application or interpretation of a rule or doctrine may violate the disadvantaged party's right to the equal protection of the laws. *See, e.g., Delo v. Stokes*, 495 U.S. 320, 110

S. Ct. 1880 (1990) (determining whether court's selective application of rules governing lesser-included-offense instructions violated party's equal protection rights).

The Fifth Amendment to the Constitution of the United States provides in pertinent part that no person shall, "be deprived of life, liberty, or property, without due process of law." Although it contains no Equal Protection Clause as does the Fourteenth Amendment, "the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3, 95 S. Ct. 572 (1975).

Indeed, the Due Process Clause of the Fifth Amendment applies to the Federal government a version of equal protection that is "largely similar" to that which governs the states under the Fourteenth Amendment, and "require[s] the same type of analysis. . . . " *Rodriguez-Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001) (citing *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S. Ct. 612 (1976)). In this respect, "[e]qual protection analysis is substantially identical under the Fifth Amendment and the Fourteenth Amendment." *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097 (1995)).

It is further settled that the equal protection rights guaranteed to citizens are, "directed to every form of state action – legislative, executive or judicial." *Williams v. Armontrout*, 891 F.2d 656, 659 (8th Cir. 1989). It is thus similarly true that equal protection rights arising under the Fifth Amendment are directed to every form of Federal action, including the unfair and discriminatory application

of the "substantial compliance" standard on the part of a bankruptcy court or court of appeals.

As a further matter, the circumstances surrounding the formulation and execution of the court-approved May 7, 1999, Stipulation make plain that the intended beneficiaries of the notice provisions were the Tier I Pool claimants who properly and timely complied with the requirements upon which the signatories had agreed. The Bankruptcy Court, and derivatively the Sixth Circuit, substantially erred in finding that, "the need for notice was not intended to benefit other Tier I Pool claimants." [App.35] Based on this erroneous presupposition, the Bankruptcy Court held that, as a matter of law, the Petitioner was "not prejudiced by a finding that the notice provisions were substantially complied with by the movants." [*Id.*]

The legal ruling was erroneous, because it is neither true as a factual matter that the notice requirements were not intended to benefit Tier I Pool claimants such as Baltimore, nor as a legal matter that only the named recipient of notice may be legally deemed to be the intended beneficiary of a notice provision. *See generally Humetrix, Inc. v. Gemplus, S.C.A.*, No. 97-55080, 1997 U.S. App. LEXIS 30062, at *4-5 (9th Cir. Oct. 23, 1997) (noting the district court's finding, "that Gemplus was a third party beneficiary of the Agency Agreement because Gemplus USA entered into the Agency Agreement at least in part for the benefit of its parent company, Gemplus"); *Conway v. Icahn & Co.*, 16 F.3d 504, 509 (2d Cir. 1994) (considering the evidence, and not ruling as a matter of law, concerning which entities the parties to the agreement intended to benefit); *William Penn S&L Assn. v.*

Chipin Cliveden Assocs., 760 F.2d 263 (3d Cir. 1985) (same).

Indeed, agreements and contracts are traditionally deemed to have been executed for the benefit of the signatories, which in this case expressly included the Tier I Pool claimant Baltimore. *See Oliver Resources PLC v. International Fin. Corp.*, 62 F.3d 128, 132 (5th Cir. 1995) (noting that contract provision, "was made for the mutual benefits of the parties to the agreement"); *Lahaina-Maui Corp. v. Tau Tet Hew*, 362 F.2d 419, 424 (9th Cir. 1966) (agreeing with district court's determination that, "the critical provision was intended for the benefit of both parties to the agreement, and thus it could not be unilaterally waived").

In this regard, the provisions of agreements are deemed to benefit signatories, and the only issue is usually whether these parties intended to bestow a further benefit upon some non-signatory. *See, e.g., Radisson Hotel Corp. v. Pontchartrain Hotel Group, L.L.C*, 983 F. Supp. 692, 695 (E.D. Mich. 1997) (agreeing that agreement, "was intended only to benefit the signatories"); *Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F. Supp. 282, 295 (N.D. Cal. 1980) (noting that litigants, "have offered no evidence that the parties to the collective bargaining agreement intended by this provision to confer rights and benefits on job applicants and, in the absence of such evidence, the Court will not make that assumption").

In sum the ruling of the Bankruptcy Court and the Sixth Circuit regarding "prejudice" was arbitrary, an abuse of discretion and violative of Petitioner's equal protection rights. These infirmities result from the diametrical nature of the conclusions that the reduction in

Baltimore's recovery occasioned by the allowance of Respondents' late-filed claims was *not prejudicial* to Baltimore while the corresponding reduction in the Respondents' recovery resulting from the disallowance of those same late-filed claims was *severely prejudicial* to Respondents. The infirm nature of this self-contradictory ruling is no less egregious simply because the court determined that allowing the Respondents' late-filed notice was not prejudicial as a matter of law. This ruling was erroneous and disenfranchised the signatories to the court-approved Stipulation, for whose benefit the notice provisions were intended. This Court should reverse it.

CONCLUSION

The decisions below call out for this Court's intervention. The decision of the Court of Appeals for the Sixth Circuit should be reversed and the Respondents' late-filed Tier I claims be disallowed; in the alternative, the decision below should be reversed and the case remanded for further proceedings that comport with the requirements of Bankruptcy Rule 9006(b).

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

COOPER & TUERK, LLP

CARL E. TUERK, JR.
Attorney for Petitioner

201 North Charles Street
Suite 2300
Baltimore, Maryland 21201
(410) 539-0300

-and-

LEVY, PHILLIPS &
KONIGSBERG, LLP

STANLEY J. LEVY
ALANI GOLANSKI
Attorneys for Petitioner

520 Madison Avenue
4th Floor
New York, New York 10022
(212) 605-6200

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED
App. 0112P (6th Cir.)
File Name: 02a0112p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: EAGLE-PICHER INDUSTRIES, INC., et al.,

Debtors.

MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND,

Appellant,

v.

STATE OF WEST VIRGINIA, MICHIGAN SCHOOL CLASS ACTION, COUNTY OF WAYNE, MICHIGAN, and B.C. HYDRO & ELECTRIC,

Appellees.

No. 00-4469

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 00-00135 – Herman J. Weber, District Judge.

Argued: January 23, 2002

Decided and Filed: April 4, 2002

Before: BOGGS and MOORE, Circuit Judges;
RUSSELL, District Judge.*

COUNSEL

ARGUED: Carl E. Tuerk, Jr., COOPER & TUERK, Baltimore, Maryland, for Appellant. Philip J. Goodman, Birmingham, Michigan, for Appellees. **ON BRIEF:** Carl E. Tuerk, Jr., COOPER & TUERK, Baltimore, Maryland, Fredric Francis Tilton, Cincinnati, Ohio, Stanley J. Levy, LEVY, PHILLIPS & KONIGSBERG, LLP, New York, New York, for Appellant. Philip J. Goodman, Birmingham, Michigan, Edward B. Cottingham, Jr., NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, Mt. Pleasant, South Carolina, for Appellees.

OPINION

RUSSELL, District Judge. This is an appeal from a bankruptcy court order granting Appellees West Virginia, *et al.*, preferred status in the disposition of a settlement trust corpus funded by Debtor Eagle-Picher Industries, Inc., despite Appellees' failure to comply fully with a mandatory notification provision. While Appellees were required to give notice to three entities as a prerequisite to preferred status, they only notified two of the three. Notwithstanding this failure, the bankruptcy court determined that Appellees were entitled to preferred status in

* The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

the trust dispensation because they had substantially complied with the notice requirements. Because we agree with the bankruptcy court that substantial compliance can operate to obviate the need for a deadline extension and because we see no abuse of discretion in the bankruptcy court's application of the doctrine in the present case, we AFFIRM.

BACKGROUND

In 1991, Eagle-Picher Industries, Inc. filed for Chapter 11 bankruptcy. A plan of reorganization was confirmed on November 18, 1996. The plan provided for the creation of a Settlement Trust to be funded by Eagle-Picher in the amount of $3 million. All damages claims against Eagle-Picher resulting from asbestos installation were to be paid out of this Settlement Trust.

After the plan confirmation, several disputes arose regarding the dispensation of the $3 million. The claimants eventually agreed upon a multi-tiered scheme, which they memorialized as a "Stipulation for Treatment of Property Damage Claims." (*See* J.A. #17, pp. 209-213.) The bankruptcy court approved this proposal on May 7, 1999. (*See* J.A. #16, pp. 166-68.) Under the claimants' framework, the balance of the Settlement Trust, after fees and expenses, would be divided into two separate funds, Tier I Product ID Claimants and Tier II Non-Product ID Claimants. The Tier I fund was to receive two-thirds of the available funds for distribution (approximately $2 million), while the Tier II fund was to receive one-third (approximately $1 million).

Access to Tier I funds was limited to parties whose claims were based on damages from Debtor's asbestos-containing building materials and who had already filed a timely Proof of Claim. (J.A. #17, p. 209, ¶ 5.) The Stipulation provided that a claimant seeking payment under Tier I

> must serve written notice of its intention to have its claim treated as a Tier I Product-ID Claim hereunder on the Committee [of Property Damage Claimants], NAAG [National Association of Attorneys General],[1] and the Property Damage Claims Administrator (the "PDCA" . . .) so that it is actually received by no later than one month after the date of the court's approval of this Stipulation. Any Claimant not giving such written notice shall automatically, and without further action by the claimant, have their claim treated as a Tier II Non-Product ID claim hereunder.

(J.A. #17, pp. 210, ¶ 7 (footnote added).)

Only two claimants, the Mayor and City Council of Baltimore ("Baltimore") and the Cincinnati School District ("Cincinnati") fully complied with this portion of the stipulation by providing written notice to the Committee, NAAG, and the PDCA on or before the June 7, 1999 deadline. Appellees state that six of eight claimants, or 75% of all claimants seeking Tier I status made the same technical error of failing to provide written notice to the

---

[1] The NAAG was Trustee for the Settlement Trust.

PDCA. Appellant disputes this assessment, and argue that only the four Appellees made the error.[2]

Two and a half months after the bankruptcy court's order, on August 23, 1999, Appellees filed a motion entitled "Motion for Waiver or Modification of Deadline to File Statement of Intent with the Property Damage Claims Administrator." (*See* J.A. #15, p. 158-165.) In that motion, Appellees stated that they had substantially complied[3] with the order by filing with the NAAG and the Committee, that the PDCA had actual notice before he mailed the Tier I claim forms, and that no prejudice had ensued. Appellees argued that due to inadvertence or misunderstanding, the notices of intention were not filed with the PDCA. Appellees stated that they believed that the NAAG was coordinating the statements and would make any necessary additional filings on behalf of the claimants. They requested that the deadline be waived or modified to allow for an additional ten days to file such notice.

On September 9, 1999, Baltimore filed its opposition to the Appellees' Motion for Waiver or Modification. (*See* J.A. #14, pp. 129-157.) Baltimore argued that Appellees' motion was governed by Bankr. R. 9006(b)(1), which

---

[2] Appellant submits that one potential Tier I claimant withdrew its attempt to claim Tier I status and another failed to notify the PDCA along with Appellees but did not join in Appellees motion.

[3] In general, substantial compliance means that a party has "[c]ompli[ed] with the essential requirements, whether of a contract or of a statute." Black's Law Dictionary 1428 (6th ed. 1991). In the life insurance context, this court has interpreted the rule to mean that "if the insured has done everything reasonably possible to effect a change in beneficiary, a court of equity will decree that to be done which ought to be done." *Cooper v. United States,* 340 F.2d 845, 848 (6th Cir. 1965); *accord Aetna Life Ins. Co. v. Hayes,* 324 F.2d 759, 761 (6th Cir. 1963).

allows for post-deadline enlargement of time where the failure to act was the result of excusable neglect. Appellant maintained that Appellees had failed to comply with Rule 9006(b)(1) because they never claimed or established that their failures were the result of excusable neglect. Baltimore also asserted that substantial prejudice would result to the claimants who timely filed because granting the motion would expand the number of qualifying participants in the Tier I division. Baltimore also argued that the PDCA would have to receive, review, assess, and consider a greater number of claims.

The Cincinnati School District also filed a Memorandum in Opposition on September 9. (*See* J.A. #13, pp. 126-28.) Cincinnati expressed concern about the numerous other potential claimants who also failed to comply with the notification requirements and would also argue that the bankruptcy court's requirements should be waived. Cincinnati further pointed to the court's previous refusal of its requests to modify or waive deadlines.[4]

Two appellees, Michigan Schools and the County of Wayne, replied to Baltimore and Cincinnati's filings (*see* J.A. #11, pp. 105-21), stating that they "honestly believed that they had already fulfilled their obligation to give notice of their intent to file Tier I claims by having previously signed and sent the 'Claims Questionnaire' provided by NAAG months before the filing deadline subsequently

---

[4] While both Baltimore and Cincinnati filed timely notice to the PDCA and opposed Appellees' motion in the bankruptcy court, only Baltimore appealed the bankruptcy court's decision.

established by the Court." (J.A. #11, p. 107.)[5] They argued that the claimants who had timely filed "will suffer no prejudice by losing the unexpected opportunity to enhance the value of their claims at the expense of those claimants who have worked long and hard to assemble the product identification evidence necessary to support Tier I claims." (J.A. #11, p. 109.) In further support of their Motion, Appellees submitted two letters from the PDCA. In the first letter, dated August 10, 1999, the PDCA stated that he had received copies of the documents filed with the NAAG in which claimants expressed their intention of seeking Tier I status. In the second, which was dated August 25, 1999, the PDCA stated his intention not to oppose the Motion for Waiver or Modification of the Deadline.

The bankruptcy court, Perlman, J., issued a decision and order on January 7, 2000, in which it allowed Appellees to seek Tier I status. (*See* J.A. #9, pp. 33-41.) In so doing, the court "f[ound] that movants have not sought relief from this court under an excusable neglect standard as has been suggested by the opposition. Instead, they have presented arguments under a substantial compliance theory, and it is on that basis that this court has considered the matter." (*Id.* at 35.) Noting that the Stipulation's notice provision was not intended to benefit other Tier I claimants, the court found that the only parties who could be prejudiced were the three parties receiving notice and that the PDCA had expressly disclaimed any prejudice.

---

[5] The PDCA and one member of the Committee also submitted a Response in support of the Appellees' Motion, which criticized Baltimore and Cincinnati's argument as "elevat[ing] form over substance." (*See* J.A. #12, pp. 122-23.)

The court also acknowledged that all parties knew that the Appellees had property damage claims against the Debtor. Because of the number of parties making the same mistake, the bankruptcy court found it reasonable to believe that some type of misunderstanding was present. The court concluded that the Appellees' submission of their statements of intent constituted substantial compliance with the notice provision, using the four-factor test of *Borzeka v. Heckler,* 739 F.2d 444 (9th Cir. 1984).

After briefing and without a hearing, the United States District Court for the Southern District of Ohio, Weber, J., affirmed the bankruptcy court's ruling. (*See* R. 9, pp. 10-19.).

DISCUSSION

In a bankruptcy appeal, the Court of Appeals "review[s] the bankruptcy court's decision rather than the district court's review of the bankruptcy court's decision." *Barlow v. M.J. Waterman & Assocs., Inc. (In re M.J. Waterman & Assocs., Inc.),* 227 F.3d 604, 607 (6th Cir. 2000). The bankruptcy court's factual findings are examined for clear error (i.e., "the most cogent evidence of mistake of justice"), while all conclusions of law are reviewed de novo. *Id.* (bankruptcy court's conclusions of law reviewed de novo); *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Financial Servs., Inc.),* 106 F.3d 1255, 1259 (6th Cir. 1997) (district court's conclusions of law reviewed de novo). Mixed questions of law and fact must be separated into their constituent parts and each analyzed using the appropriate standard of review. *In re Baker & Getty,* 106 F.3d at 1259. Finally, the bankruptcy court's equitable determinations are reviewed for an abuse

of discretion. *In re Waterman,* 227 F.3d at 607; *Gordon Sel-Way, Inc. v. United States (In re Gordon Sel-Way, Inc.),* 270 F.3d 280, 289 (6th Cir. 2001).

I.

Baltimore attempts to portray the lower courts' use of the "substantial compliance" doctrine as a substitute for Bankr. R. 9006(b)(1)'s "excusable neglect" requirement. This characterization represents a misunderstanding of both terms' usage in this case. The bankruptcy court held that Appellees' substantial compliance with the notice provision made their Tier I election timely, not that Appellees' substantial compliance with the provision justified an extension of time. Thus, according to the court, Appellees timely complied, making a deadline extension and a resort to Rule 9006(b) (excusable neglect) unnecessary.

Correspondingly, the appropriate inquiry is whether the substantial compliance doctrine can be applicable to the Stipulation's notice requirement, or whether strict compliance is required. This evaluation of substantial compliance's general applicability is a question of law that is reviewed de novo. *See In re Waterman,* 227 F.3d at 607; *In re Baker & Getty,* 106 F.3d at 1259.

Appellant Baltimore argues that Bankruptcy Rule 9006(b)(1) prevents the use of the equitable substantial compliance doctrine. In pertinent part, that rule states:

> (b) Enlargement
>
> (1) In general
>
> [W]hen an act is required or allowed to be done at or within a specified period . . . by order of the

> court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Bankr. R. 9006. Appellant insists that the rule permits deviation from the June 7 deadline only for movant's "excusable neglect."

Rule 9006(b), however, applies only to the enlargement of time. Here, the bankruptcy court did not enlarge Appellees' time to file, but instead determined that they had already timely filed. Indeed, Appellees submitted no filing after the deadline.[6] Consequently, the text of Rule 9006(b) poses no obstacle to the use of the substantial compliance doctrine. The text provides no reason why the substantial compliance doctrine should be categorically inapplicable in situations where the rule's "excusable neglect" standard governs deadline extensions. Entirely different are the arguments (1) that Rule 9006(b)'s "excusable neglect" standard prevents deadline extension based upon substantial compliance, and (2) that Rule 9006(b) prevents equity from ever finding deadline compliance despite technical noncompliance.

Although the court is unaware of any previous case applying the substantial compliance doctrine to avoid

---

[6] Although Appellees' Motion was styled "Motion for Waiver or Modification of Deadline to File Statement of Intent with the Property Damage Claims Administrator," Appellees' substantive argument was that they had substantially complied with the deadline. (*See* J.A. #15, 158-65.) Additionally, the bankruptcy court ruled that the Appellees had already complied with the order, and the court did not waive, modify, or extend the deadline. (*See* J.A. #9, pp. 33-41.)

deadline extension issues, two bankruptcy cases within this circuit have discussed the doctrine in the context of parties seeking extensions. In *In re Velker,* 145 B.R. 30 (Bankr. N.D. Ohio 1992), the bankruptcy court approved Debtor's reorganization plan pending a legal description by June 18, 1992. *Id.* at 31. After Debtor was given an extension until July 12, 1992, she still missed the description deadline and her bankruptcy petition was dismissed for want of prosecution. *Id.* Debtor filed a Motion to Reconsider on July 23, 1992 that contained the requisite description. *Id.* At an August 10, 1992 hearing on Debtor's Motion, Debtor's representative informed the court for the first time that Debtor had submitted the legal description to the Trustee on July 20, eight days after the filing deadline, and claimed that this action constituted substantial compliance with the deadline, which made the failure to act one of "excusable neglect." *See id.* at 31-32. The bankruptcy court refused to find excusable neglect, noting that the Debtor never provided any justification for her admittedly tardy filing. *Id.* at 32.

In the second case, *Margraf v. Oliver (In re Oliver),* 28 B.R. 420 (Bankr. S.D. Ohio 1983), the bankruptcy court sent Notice to all creditors of Debtors' Petition and proposed Plan, which included notification of an August 4, 1981 confirmation hearing. *Id.* at 422. This Notice also provided that "Complaints objecting to confirmation shall be filed . . . at least five -5- [days] before the confirmation hearing." *Id.* One creditor filed a Complaint on August 3, a mere day before the hearing. *Id.* In response to Debtors' request to dismiss the Complaint, the creditor alleged good faith attempt to comply with the court's procedure and substantial compliance with the deadline. *Id.* The creditor claimed that he was unable to complete the Complaint

until August 3. *Id.* Initially noting that the Complaint was unquestionably late, the court nonetheless found that the creditor had substantially complied with the Order and that this substantial compliance justified extending the deadline for excusable neglect. *Id.* at 423.[7]

These two cases illustrate that the substantial compliance doctrine is not incompatible with the excusable neglect standard for deadline extension. Although neither case held that the substantial compliance doctrine could be used to obviate the need for a Rule 9006(b) time extension, both employed notions of substantial compliance within the framework of Rule 9006(b)'s excusable neglect standard. With post-deadline substantial compliance available as a consideration in the Rule 9006(b) calculus, it is not inconceivable that pre-deadline substantial compliance could also be available to avoid the calculus altogether.

Additionally, the Stipulation's filing requirement was a notice provision. When dealing with notice provisions, courts have recognized that "actual notice [is] more important than strict compliance with . . . technical requirements." *Sherer v. Construccion Aeronauticas, S.A.*, 987 F.2d 1246, 1248 (6th Cir. 1993) (citing *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3rd Cir.1981)) (discussing the notice provisions in the Foreign Sovereign Immunities Act); *see also Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) (substantial compliance with FSIA service of

---

[7] A third relevant case, *In re Riggan*, 102 B.R. 677 (Bankr. W.D. Tenn. 1989), held that Fed. R. Civ. P. 60(b) relief based upon "mistake, inadvertence, surprise, or excusable neglect" was justified where debtor had substantially complied with filing requirement despite misnaming answer and misfiling it under the general case number.

process requirements achieved by actual notice and lack of prejudice).

11 U.S.C. § 105(a) gives a bankruptcy court broad equitable power to "prevent an abuse of process," and there is no reason why these equitable powers would not include making a finding of substantial compliance where such a finding would prevent the need for a Rule 9006(b) excusable neglect analysis. *Cf. Sherer, supra* (substantial compliance test appropriate for service of foreign sovereigns even though relevant statute was clear in its requirements and made no mention of substantial compliance). As this court has previously noted, "bankruptcy law, perhaps more than any other legal field, recognizes that people will make mistakes and need not be penalized for every error." *Bittel v. Yomato Int'l Corp.,* 70 F.3d 1271 (table), 1995 WL 699672, at *3 n.6 (6th Cir. Nov. 27, 1995); *accord In re Riggan,* 102 B.R. 677, 679 (Bankr. W.D. Tenn. 1989) ("Reliance on the Bankruptcy Code, chapter and verse, is laudable, but statutory detail should never obscure fair and equitable principles."). Accordingly, we hold that substantial compliance can be properly applied to find deadline compliance in situations where a deadline extension would be permissible only by the "excusable neglect" standard of Bankr. R. 9006(b).

II.

Having concluded that substantial compliance is not categorically inapplicable to situations like the present one, we now turn to the bankruptcy court's decision to apply the doctrine in Appellees' favor. The substantial compliance rule is an equitable doctrine, *BankAmerica Pension Plan v. McMath,* 206 F.3d 821, 827 (9th Cir. 2000),

see Aetna Life Ins. Co. v. Hayes, 324 F.2d 759, 761 (6th Cir. 1963), so the bankruptcy court's decision to apply it must be reviewed for an abuse of discretion. *In re Waterman,* 227 F.3d at 607; *see also McMath,* 206 F.3d at 828 ("Courts have discretion to employ the equitable doctrine of substantial compliance.").

> An abuse of discretion is defined as a "definite and firm conviction that the [court below] committed a clear error of judgment." *Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.,* 181 F.3d 759, 770 (6th Cir. 1999); *Bowling v. Pfizer, Inc.,* 102 F.3d 777, 780 (6th Cir. 1996). The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion. *See Washington v. Sherwin Real Estate, Inc.,* 694 F.2d 1081, 1087 (7th Cir. 1982); *see also In re Carter,* 100 B.R. 123, 126 (Bankr. D. Me. 1989).

In re Waterman, 227 F.3d at 607-08 (alteration in original).

In concluding that Appellees had substantially complied with the Order's notice provision, the bankruptcy court relied upon Appellees' satisfaction of four factors: "(a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed." (J.A.

#9, p. 36) (quoting *Borzeka v. Heckler,* 739 F.2d 444, 447 (9th Cir. 1984).) [8]

The bankruptcy court found that the first element had been met, since the Committee and NAAG received written notice from Appellees and the PDCA had actual notice. (*Id.* at 37.) The court next determined that there had been no prejudice to either the PDCA or Baltimore and Cincinnati, as the former had expressly disclaimed prejudice and the ability of the latter pair to assert a claim and seek recovery had not been harmed. (*Id.* at 37-38.) Third, the bankruptcy court held that there had been justifiable excuse for Appellees' failure to serve properly. (*Id.* at 38.) In reaching this conclusion, the court reasoned that the Appellees' proffered excuse – that their failure to serve the PDCA was based upon a misunderstanding that the NAAG was coordinating notice to the third party – seemed reasonable in light of the number of movants under the same impression. (*Id.*) Further, the court opined, Appellees did not simply sit on their rights, but had instead submitted the statement of intent to two of the three required parties. (*Id.*) Analyzing the fourth factor, the court determined that Appellees would suffer severe prejudice from denial of their motion, reasoning that Appellees' recovery would be substantially reduced by their relegation to Tier II status. (*Id.* at 38-39.).

---

[8] Because Baltimore does not challenge the bankruptcy court's formulation of the substantial compliance test, we assume without deciding that this approach was correct. *See Dorris v. Absher,* 179 F.3d 420, 425-26 (6th Cir. 1999) (issue not raised in briefs considered waived unless "exceptional case" exists where court of appeals's failure to address argument would result in a miscarriage of justice).

Evaluating the facts at hand, we can find no abuse of discretion by the bankruptcy court in applying the substantial compliance doctrine. Appellees presented evidence that the PDCA received notice of Appellees' intent to seek Tier I status before he distributed any claims forms. The PDCA also expressly disclaimed any prejudice from Appellees' failure to strictly comply with the Order. Further, if Baltimore and Cincinnati suffered any prejudice at all from the court's allowance of Appellees' Tier I claim, it was their loss of a windfall. Such a windfall merits no protection. Moreover, the appellees indicated a clear intention to seek Tier I status by sending notice to two of the three required entities, and at least twice as many claimants failed to notify the PDCA as actually did notify the PDCA. Finally, Appellees' recovery would be greatly reduced if their error relegated them to Tier II status.

CONCLUSION

The substantial compliance doctrine can properly be applied to find timeliness despite technical noncompliance. This remains true in situations where a deadline extension would be subject to Bankr. R. 9006(b)'s requirement of "excusable neglect." Furthermore, the bankruptcy court did not abuse its discretion in applying the doctrine to the present case. For these reasons, the judgment of the bankruptcy court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4469

In re: EAGLE-PICHER
INDUSTRIES, INC., et al.,

Debtors.

MAYOR AND CITY COUNCIL
OF BALTIMORE, MARYLAND,

Appellant,

v.

STATE OF WEST VIRGINIA,
MICHIGAN SCHOOL CLASS
ACTION, COUNTY OF WAYNE,
MICHIGAN, and
B.C. HYDRO & ELECTRIC,

Appellees.

Before: BOGGS and MOORE, Circuit Judges; RUSSELL, District Judge.

JUDGMENT

(Filed Apr. 4, 2002)

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the bankruptcy court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:

EAGLE-PITCHER [sic] INDUSTRIES, INC., et al. MAYOR AND CITY
OF BALTIMORE C-1-00-135

Plaintiff(s),

v.

STATE OF WEST VIRGINIA, et al.

Defendant(s).

JUDGMENT IN A CIVIL CASE

(Filed Oct. 26, 2000)

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the decision of the bankruptcy court is AFFIRMED. Case is TERMINATED on the docket of this Court.

October 26, 2000

Kenneth Murphy, Clerk

/s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:

EAGLE-PICHER INDUSTRIES, INC., et al., C-1-00-135

Debtors

MAYOR AND CITY OF BALTIMORE,

Appellant

v.

STATE OF WEST VIRGINIA, et al.,

Appellees

ORDER

(Filed Oct. 26, 2000)

This matter is before the Court upon Appellant Mayor and City of Baltimore's (Baltimore's) appeal from an order issued by the United States Bankruptcy Court for the Southern District of Ohio on January 5, 2000, holding that the State of West Virginia, et al, (Appellees) had substantially complied with the notice provision of the May 7, 1999 order of the Bankruptcy Court. Jurisdiction is premised on 28 U.S.C. § 158(a).

The Request for Oral Argument is Denied

Bankruptcy Rule 8012 provides that oral argument shall be allowed in all cases unless the district judge determines after examination of the briefs and record that oral argument is not needed. The Rule further provides that, "Oral argument will not be allowed if (1) the appeal is frivolous; (2) the dispositive issue or set of issues has

been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."

In the present case, the facts and legal arguments are adequately presented in the parties' briefs and in the record, and the Court would not be significantly aided by oral argument. Accordingly, oral argument is not required.

Procedural Background

Appellees agree that the Appellant's Statement of the Facts sets forth a chronologically accurate representation of the events leading to this appeal with one exception, accordingly, the Court will provide a brief review of those facts upon which the parties have agreed.

In 1991, Eagle-Picher Industries, Inc. filed for Chapter 11 bankruptcy. The plan of reorganization provided for the creation of a Settlement Trust to be funded by Eagle-Picher in the amount of $3 million. All claims for damages against Eagle-Picher for damages resulting from installation of asbestos were to be paid out of this Settlement Trust.

On May 7, 1999 the Bankruptcy Court entered an Order granting a Joint Motion for Approval of a Stipulation of Treatment of Property Damage Claims. Under this Order and Stipulation, the balance of the Settlement Trust, after fees and expenses, would be divided into two separate funds: Tier I – Product ID) Claimants and Tier II – Non-Product ID Claimants. The Tier II fund was to receive one-third of the available funds for distribution,

and the Tier I fund was to receive two-thirds of the available funds.

The Order and Stipulation provided that in order for a claimant to attempt to seek payment under Tier I, the claimant had to

> serve written notice of its intention to have its claim treated as a Tier I – Product ID Claim hereunder on the committee, NAAG, and the Property Damage Claims Administrator [the PDCA] . . . so that it is actually received by no later than one month after the date of the Court's approval of this Stipulation. Any Claimant not giving such written notice shall automatically, and without further action by the claimant, have their claim treated as a Tier II – Non-Product ID claim hereunder.

See Record Item No. I; Order of Bankruptcy Court May 7, 2000.

Appellant states that only two claimants, The Mayor and City Council of Baltimore (Baltimore) and the Cincinnati School District (Cincinnati) fully complied with this portion of the stipulation by providing written notice the Committee, NAAG, and the PDCA on or before June 7, 1999. Appellees state that six of eight claimants, or 75% of all claimants seeking Tier I status made the same technical error of failing to provide written notice to the PDCA.

On August 23, 1999, Appellees filed a Motion with the Bankruptcy Court entitled "Motion for Waiver or Modification of Deadline to File Statement of Intent with the Property Damage Claims Administrator" Record Item No. 3. In that motion, Appellees stated that substantial compliance was achieved by filing with the NAAG and the

Committee and that no prejudice had ensued. Appellees argued that due to inadvertence or misunderstanding the notices of intention were not filed with the PDCA. Appellees stated that they believed that the NAAG was coordinating the statements and would make any necessary additional filings on the behalf of the claimants. Appellees argued that they provided substantial compliance with the notice procedure and that the PDCA was on actual notice. In light of the absence of prejudice, substantial compliance, and actual notice by the PDCA, the Appellees requested that the deadline be waived or modified to allow for an additional ten days to file such notice. Record No. 3.

On September 9, 1999, Baltimore filed their opposition to the Motion for Waiver or Modification. Baltimore argued that the motion was governed by Bankruptcy Rule 9006(b)(2) which allows for the enlargement of time where the failure to act was the result of excusable neglect. Baltimore asserted that Appellees had failed to comply with B.R. 9006(b)(2) because they never claimed or established that their failures were the result of excusable neglect. Baltimore also argued that the motion was not supported by any Affidavits or verified facts. Baltimore asserted that substantial prejudice would result to the claimants who timely filed because allowing the motion would expand the number of qualifying participants in the division of the Tier I fund. Baltimore also argued that the PDCA would have to receive, review, assess, and consider a greater number of claims. Rec. No. 4.

The Cincinnati School District filed a Memorandum in Opposition on September 9, 1999. Cincinnati stated that it was concerned about the numerous other potential claimants who also failed to comply with the notification requirements and would also argue that the Bankruptcy

Court's requirements should be waived. Cincinnati remarked that on previous occasions the Bankruptcy Court had refused to waive or modify deadlines requested by Cincinnati. Rec. No. 5.

In their response, Appellees submitted a letter dated August 25, 1999 in which the PDCA states that it is not his intention to file an opposition to the Motion for Waiver or Modification of the Deadline. Appellees also submitted a letter dated August 10, 1999 in which the PDCA stated that he had received copies of the documents filed with the NAAG in which claimants expressed their intention of filing in Tier I.

Appellees stated in their response that they "honestly believed that they had already fulfilled their obligation to give notice of their intent to file Tier I claims by having previously signed and sent the 'Claims Questionnaire' provided by NAAG months before the filing deadline subsequently established by the Court. . . . " Record Item No. 5. Appellees argued that the claimants who timely filed "will suffer no prejudice by losing the unexpected opportunity to enhance the value of their claims at the expense of those claimants who have worked long and hard to assemble the product identification evidence necessary to support Tier I claims." Record Item No. 5.

The Bankruptcy Court issued a decision and order filed in January 2000. The Bankruptcy Court stated "[w]e find that movants have not sought relief from this court under an excusable neglect standard as has been suggested by the opposition. Instead, they have presented arguments under a substantial compliance theory, and it is on that basis that this court has considered the matter." Record Item No. 9. The Bankruptcy Court explained that

the substantial compliance theory had been used in bankruptcy contexts and addressed the four (4) elements set out by the Ninth Circuit in *Borzeka v Heckler*, 739 F.2d 444 (9th Cir. 1984).

The Bankruptcy Court noted that the notice provision was not intended to benefit other Tier I Pool claimants and therefore, they could not be prejudiced by a finding that the notice provisions were substantially complied with by the Appellees. The Bankruptcy Court mentioned that the other Tier I Pool claimants ability to assert a claim was not harmed, although they could potentially be subject to a smaller recovery if all the claims were successful. The Bankruptcy Court noted that all the parties were aware that the Appellees had property damage claims against the Debtor. The Bankruptcy Court stated that the only parties who could be prejudiced were the parties that were to obtain notice and those parties disclaimed any prejudice. Because of the number of parties making the same mistake, the Bankruptcy Court found it reasonable to believe that some type of misunderstanding was present. The Bankruptcy Court concluded that the Appellees submission of their statement of intent was substantial compliance with the notice provisions. Record. Item No. 9.

On January 18, 2000, Baltimore filed its notice of Appeal. Appellant asserts the following as issues presented:

1. Did the bankruptcy court err in granting the Appellees' Motion for Waiver or Modification of an expired deadline on the basis of 'equitable principles' rather than by the application of Bankruptcy Rule 9006(b)(1)?

2. Did the bankruptcy court err in making factual findings in support of its January 7, 2000 Order granting Appellees' Motion for Modification of a Court ordered Deadline where the Motion was not supported by affidavits, sworn testimony or verified exhibits?

Standard of Review

This Court must review the bankruptcy court's conclusions of law *de novo* and must consider its findings of fact under a clearly erroneous standard. *In re Baker & Financial Services, Inc.,* 106 F.3d 1255, 1259 (6th Cir. 1997) (citing, Fed. R. Bankr. P. 8013).

Opinion

Appellant asserts that the Bankruptcy Court's factual findings were without evidentiary support and were therefore clearly erroneous. Appellees argue that the Appellant has agreed with all the facts that support the Bankruptcy Court's findings of fact.

Appellants acknowledge that the Appellees filed their statement of intent with the Committee and the NAAG. Record Item No. 4. Appellants acknowledge that the PDCA received copies of the Appellees statements of intent. Record Item No. 4. Thus the Bankruptcy Court's finding of fact that all three entities did receive actual notice of Appellees' claims was not clearly erroneous.

Appellees argue that the technical defect in delivery of the Appellees' statements had no effect on the Appellant's ability to pursue their own Tier I claims and the purpose of the notice was not to benefit other claimants. Appellees argue that Appellants are not the intended recipients of

the statements of intent and since the Appellants do not have an automatic right to the Tier I funds they would not be prejudiced. Also the PDCA specifically disclaimed any prejudice and stated that he was "fully prepared to review all claims that may be filed, whether there are three or eight claimants." Record Item No. 7. Therefore, the Bankruptcy Court's findings that there was no prejudice were not clearly erroneous.

Appellees averred to the Bankruptcy Court that they "reasonably believed that filing with the NAAG and the [Committee] satisfied the claimants' obligations. It was believed that the NAAG was coordinating the statements of intent and would make any necessary additional filings on the claimants' behalf." Record Item No. 3. The Bankruptcy Court stated that "[c]onsidering the number of movants who were under the same impression, it seems reasonable to believe that some type of misunderstanding was present." Thus, the Bankruptcy Court's finding that there was a justifiable excuse for the failure to properly serve notice to the PDCA was not clearly erroneous.

The Bankruptcy Court also found that although the Appellees could have participated as Tier II claimants, the amount of money available to Tier II is extremely limited and therefore, the Appellees would suffer severe prejudice if the motion had been denied. Based on the record, this finding was not clearly erroneous.

Appellant argues that B.R. 9006 is the only legal standard for the Bankruptcy Court to apply in considering Appellees' Motion for Waiver or Modification and the only authority under which to grant such a motion. Appellant contends that B.R. 9006 provides an 'excusable neglect'

standard which Appellees cannot and did not meet. Appellant asserts that a substantial compliance theory has never been used in bankruptcy in the context of a time deadline.

Appellees argue that the cases cited by Appellant are all cases in which creditor sought relief to extend a deadline under B.R. 9006(b)(1) and the excusable neglect standard. Appellees contend that their motion sought relief under a substantial compliance theory and not an extension of time to file.

In *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380 (1993), the Supreme Court addressed the question of whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court could constitute "excusable neglect" within the meaning of Bankruptcy Rule 9006. The Supreme Court did not address whether a theory of substantial compliance could provide relief. The Court however did state that B.R. 9006 "is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules." *Id.* at 15.

In the case of *In re Coastal Alaska Lines, Inc*, 920 F.2d 1428, (9th Cir. 1990), the court addressed the issue of whether the bankruptcy court has equitable discretion, apart from Rule 9006, to grant extensions of time for filing a proof of claim pursuant to B.R. 3002. Under 11 U.S.C. § 105(a), "the court may issue any order, process or judgment that is necessary or appropriate to carry out the provision of this title." The *Coastal Alaska* court, however, reasoned that the language of B.R. 9006(b) states that the court "may only enlarge time for taking action under Rules

. . . 3002(c) . . . only to the extent and under the conditions stated in those rules." The court pointed out that "Rule 3002(c) identifies six circumstances where a late filing is allowed and excusable neglect is not one of them." *Id.* at 1432. The court therefore agreed with other courts that "Bankruptcy Rule 3002(c) is peremptory and that a bankruptcy court lacks any equitable power to enlarge the time for filing a proof of claim unless one of the six situations in Rule 3002(c) exists." *Id.* at 1432 (citing, *In re S.A. Morris Paving Co.*, 92 B.R. 161, 163 (Bankr. W.D. Va. 1988); See also *In re Vertientes, Ltd*, 845 F.2d 57, 60 (3rd Cir. 1988) (Under B.R. 9006(b)(1), a bankruptcy court has discretion to extend time to file a proof of claim only under the circumstances set out in the Rule and the court has no discretion to grant an extension simply because no prejudice would result or for any other equitable reason). There is no allegation that Appellees are attempting to proceed under Rule 3002 therefore these cases are accordingly distinguishable.

The doctrine of substantial compliance has been addressed in a bankruptcy context although not in the circumstances of the case at bar. See *In re Temple*, 228 B.R. 896, 898 (N.D. Ohio 1998) (no finding of contempt where alleged contemnor demonstrated substantial compliance with court order); See also *In re Price*, 211 B.R. 170 (M.D. Pa. 1997) (substantial compliance is sufficient to satisfy debtor's duty to file bankruptcy schedule).

In *In re Winner Corp.*, 511 F.2d 1010 (6th Cir. 1975), the court appears to acknowledge a substantial compliance theory. In the *Winner* case, the court addressed "whether the District Court erred in granting, without a hearing, [debtor's] motions to dismiss [creditor's] appeals from the . . . order of the Bankruptcy Judge. The ground for dismissal

was that creditor should have filed petitions for review under § 39(c) of the Bankruptcy Act . . . instead of notices of appeal." *Id.* at 1013. The court stated the [sic] "if the notices of appeal are treated as petitions for review they did substantially comply with § 39(c), and they were timely filed as provided in that section." *Id.* at 1014.

In the case at bar, the Bankruptcy Court accurately assessed the provision at issue as a notice provision. The Bankruptcy Court stated that "[w]hen dealing with notice provisions, courts have recognized that 'actual notice is more important than strict compliance with . . . technical requirements.'" Record Item No. 9, (quoting, *Sherer v. Construccione Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (discussing substantial compliance, actual notice and the Foreign Sovereign Immunities Act)). The Bankruptcy Court also noted that the Sixth Circuit has not formulated a test for substantial compliance with a notice provision and therefore adopted the test set out in the Ninth Circuit to establish substantial compliance with Fed. R. Civ. P. 4. See *Borzeka v. Heckler,* 739 F.2d 444 (9th Cir. 1984). As discussed above, the Bankruptcy Court found that 1) the party intended to receive the notice had receive [sic] actual notice; 2) the appellant would not suffer prejudice from the defect; 3) there was justifiable excuse for the failure; and 4) the appellees would be severely prejudiced if the motion was denied. Based on the foregoing, the Bankruptcy Judge did not err in holding that the Appellees' have substantially complied with the notice provision and are eligible to participate in the Tier I Pool.

Conclusion

For the above reasons, it is **ORDERED** that the decision of the bankruptcy court is hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ Herman J. Weber
Herman J. Weber, Judge
United States
District Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:

Consolidated Case No.
1-91-00100
Chapter 11
Judge Pearlman

EAGLE-PICHER
INDUSTRIES, INC., *et al.*, **DECISION AND ORDER**

Debtors (Filed Jan 5, 2000)

At Cincinnati, in said District, on January 7, 2000.

This matter is before the Court on the Motion for Waiver or Modification of Deadline to File Statement of Intent with the Property Damage Claims Administrator filed by the State of West Virginia, *et al.* On May 7, 1999, this Court entered an Order approving the Stipulation for Treatment of Property Damage Claims ("Stipulation") in the above-referenced bankruptcy. Pursuant to the terms of the Stipulation, any party desiring to be a "Tier 1 Pool" claimant was instructed to submit a statement of intent with the National Association of Attorneys General ("NAAG"), the Unofficial Committee of Property Damage Claimants ("Committee"), and the Property Damage Claims Administrator ("PDCA") by June 7, 1999. The movants herein filed statements of intent with both the NAAG and the Committee, but did not submit a statement of intent to the PDCA. They now request relief which would allow them to participate in the Property Damage Trust as Tier 1 Pool claimants notwithstanding the failure to furnish a written statement to the PDCA.

This court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334 (b) and the General Order of Reference entered in this District. This is a core proceeding under 28 U.S.C. §157 Q (2) (A) and (B). Additionally, this Court has been granted, in Article 6.13 of the Amended Asbestos Property Damage Settlement Trust Agreement, specific authority to interpret and enforce provisions of the Trust Agreement.

Movants have requested that the deadline to file a statement of intent with the PDCA be either waived or modified. According to movants, their substantial compliance with the notice provisions and the lack of prejudice to the PDCA warrant the waiver or extension of the deadline. They represent that the PDCA had notice of the intent of the parties to file prior to the distribution of any claims forms. The PDCA has specifically disclaimed any prejudice.

Two claimants who complied with the requirements for submitting statements of intent to file have opposed a waiver or extension of the terms set forth in the Trust Agreement. According to claimants, the court could only waive or modify the terms if "excusable neglect" was demonstrated, which has not been done. Those opposing the motion also argue that waiver or modification would prejudice both the compliant claimants because it could reduce their recovery from the fixed-fund trust, and the PDCA, because it will require additional work of him. Finally, they argue that movants are not denied recovery by strict application of the notice requirements as they can still participate in the Trust as Tier 2 Pool claimants.

In reviewing the motion at hand, we find that movants have not sought relief from this court under an

excusable neglect standard as has been suggested by the opposition. Instead, they have presented arguments under a substantial compliance theory, and is on that basis that this court has considered the matter. We find that submission by movants of a statement of intent to two of the three entities required to be noticed under the Stipulation results in substantial compliance with the notice requirements when the third party has received nonwritten notice.

The substantial compliance doctrine is defined as "[c]ompliance with the essential requirements, whether of a contract or a statute." Black's Law Dictionary 996 (6th Ed. 1991). The doctrine has been used in many bankruptcy contexts. *See, e.g., Malloy v. Arcadia Financial Ltd. (In re Suddarth)*, 232 B.R. 789 (Bankr. N.D. Okla. 1999) (finding creditor substantially complied with state statute for perfecting interest in automobile); *In re Temple*, 228 B.R. 896 (Bankr. N.D. Ohio 1998) (discussing what constitutes substantial compliance with a court order); *Century Nat'l Bank and Trust Co. v. Skyline Properties, Inc. (In re Skyline Properties, Inc.)*, 134 B.R. 830 (Bankr. W.D. Penn 1992) (using the substantial compliance doctrine for mechanic's lien statute purposes)). It is entirely appropriate that the doctrine be applied here.

The provision at issue is a notice provision. Any claimant wanting to become a Tier 1 Pool claimant was required to submit notice to three entities via a statement of intent. When dealing with notice provisions, courts have recognized that "actual notice [is] more important than strict compliance with . . . technical requirements." *See, e.g., Sherer v. Construccione Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (discussing the notice provisions in the Foreign Sovereign Immunities Act); *Straub v. A P*

Green, Inc., 38 F.3d 448 (9th Cir. 1994) (substantial compliance test satisfied by actual notice). Although the Sixth Circuit has not formulated a test for substantial compliance and notice provisions, the Ninth Circuit has done so for Fed. R. Civ. P. 4. *See Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984).

According to the Ninth Circuit, to prove substantial compliance with Rule 4 notice requirements, four elements must be satisfied: "(a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed. *Id.* at 447. We find this test helpful in reviewing the issue presented here.

The purpose of the provision requiring the statement of intent to be filed with the three listed entities was obviously to provide notice of which claim holders would be participating in the Tier 1 Pool Class. Two of the three entities received notice from movants as intended by the notice provision. The third, the PDCA, was not notified in writing, but did receive actual notice of movants' intent to participate in the Tier 1 Pool. The result was that all three entities intended to receive notice did, in fact, receive actual notice of movants' intent to participate in the Tier 1 Pool.

As the need for notice was not intended to benefit other Tier 1 Pool claimants, they are not prejudiced by a finding that the notice provisions were substantially complied with by the movants. Although the addition of movants to the Tier 1 Pool will very likely result in a smaller recovery for each claim holder, their ability to

assert a claim and seek recovery is not harmed. Further, the parties opposing this motion knew prior to the Stipulation that the movants had property damage claims against the Debtor and that they might be sharing in the Trust funds; available. The real prejudice from the failure to strictly comply with the provisions would have harmed those entities who were to receive notice. Since the only entity who was not noticed has disclaimed any prejudice, no real prejudice exists.

The movants assert that the reason the statement of intent was submitted to two parties, but not the third, was the result of a misunderstanding that the NAAG was coordinating notice to the third party. Considering the number of movants who were under the same impression, it seems reasonable to believe that some type of misunderstanding was present. This is not a case where the movants did nothing. They submitted the statement of intent to two of the three required parties. The movants were not sitting on their rights and should not be penalized for a misunderstanding, especially when actual notice was received. We find that there was a justifiable excuse for the failure to serve properly.

Finally, we find that movants would suffer severe prejudice if the present motion is denied. Although the movants could participate as Tier 2 Pool claimants, the amount of money available for recovery is extremely limited. The Tier 2 Pool is being funded with only ⅓ of the funds from the Trust. This ⅓ is then further allotted into categories by the nature of the claims. For example, school class actions will all share in 24% of the original ⅓; states will share in another 24%, etc. The ability to assert a claim in the Tier 2 Pool does not have the same value as a claim as a Tier 1 Pool member.

Based on the above findings, this court holds that the movants' submission of their statement of intent to two of the three entities is substantial compliance with the notice provision in light of actual notice being received by the PDCA. The notice provision having thereby been satisfied, the movant's are eligible to participate in the Tier 1 Pool.

So Ordered.

/s/ Burton Perlman
BURTON PERLMAN
U. S. BANKRUPTCY
JUDGE

Copies to:

Edward J. Westbrook, Esq.
Edward B. Cottingham, Jr., Esq.
Attorneys for State of West Virginia
151 Meeting Street, Suite 600
Charleston, SC 29402

J. J. Camp, Esq.
Attorney for B.C. Hydro & Electric
4th Floor, Randall Building
555 West Georgia Street
Vancouver, BC
V6B 123, Canada

Joan Lebow, Esq.
Doug Klein, Esq.
Attorneys for Illinois Masonic Medical Center
836 Wellington Avenue, Room 1602
Chicago, IL 60657

Phil Goodman, Esq.
Attorney for Michigan Schools Class Action
280 North Old Woodward Avenue, Suite 407
Birmingham, MI 48009

Alan Kleinman, Esq.
Attorney for City of New York and Board of Education
City of New York Law Department
100 Church Street
New York, NY 10007

Carl E. Tuerk, Jr., Esq.
Attorney for the Mayor and City Council of Baltimore
201 North Charles Street, Suite 2300
Baltimore, MD 21201

Joel M. Ressler, Esq.
Senior Deputy Attorney General
Office of the Attorney General
Attorney for the Commonwealth of Pennsylvania
Strawberry Square, 15th Floor
Harrisburg, PA 17120

Susan J. Forney, Esq.
Chief Deputy Attorney General
Chief, Litigation Section
Office of the Attorney General
Attorney for the Commonwealth of Pennsylvania
Strawberry Square, 15th Floor
Harrisburg, PA 17120

John P. Concannon, Esq.
Attorney for Cincinnati City School District
2651 Burnet Avenue, P. O. Box 5381
Cincinnati, OH 45201

William H. Blessing, Esq.
Attorney for Cincinnati Board of Education
119 East Court Street, Suite 500
Cincinnati, OH 45202

Stanley J. Levy, Esq.
Attorney for Mayor and City Council of Baltimore
520 Madison Avenue, 4th Floor
New York, NY 10002

W. D. Hilton, Jr.
Property Damage Claims Administrator
Eagle-Picher Property Damage Claim Facility
P. O. Box 8605
Greenville, TX 75404

Karen Cordry, Esq.
National Association of Attorneys General,
Fund Custodian
Eagle-Picher Property Damage Trust;
Unofficial Committee of Property Damage
Claimants –
Eagle-Picher Bankruptcy
750 First Street, N.E., Suite 1100
Washington, D. C. 20001

Douglas Tripp, Esq.
U.S. Trustee
1/7/00 (Lcs)